

People have described those fundamental rights in many different ways. There are a variety of approaches to figuring out what they are. Almost every Supreme Court Justice since then has accepted the existence of some, and what they are and how you find them is a big question.

Senator LEAHY. Thank you, Mr. Chairman.

The CHAIRMAN. In the meantime, there was the incorporation doctrine.

Judge BREYER. Yes.

The CHAIRMAN. Senator Grassley.

#### OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I would like to have my opening statement inserted into the record.

[The prepared statement of Senator Grassley follows:]

##### PREPARED STATEMENT OF SENATOR GRASSLEY

Congratulations on your nomination to the Supreme Court, Judge Breyer. It is readily apparent that your nomination developed from the reputation you have established over many years as a law professor and judge.

Your writings and legal opinions appear to reflect an understanding of the proper place of the Supreme Court, and courts generally, in our society. I find your approach to deciding cases to remind me of Justice Frankfurter. Time and again, when asked to find statutes unconstitutional, you have examined the language and legislative intent, and resolved all legitimate questions in favor of constitutionality. This deference to the legislature is a hallmark of judicial restraint.

In recent decades, too many judges have permitted political considerations of desired policy results to affect their legal conclusions. These decisions are based on the view that the Constitution, rather than guaranteeing specific rights, broadly protects judicially-defined liberty and dignity. More recently, the Court has focused more on legal principles, rather than personal preference. There are those who may hope that their policy goals, unattainable through the political process, can be obtained through your vote on the Supreme Court. Your record as a judge thus far gives little support to such hopes. Nonetheless, as a Supreme Court Justice, you will not be constrained to follow precedent to the same extent as a Federal judge.

The legitimacy of judicial review derives from the power to enforce the Constitution as supreme law. When judges impose their own personal views, they necessarily do not apply the law. The basis for judicial review evaporates in these circumstances, and our limited government of laws becomes a government of people.

I hope to explore with you during your testimony issues relating to the role of judges and important principles of constitutional and statutory decisionmaking. I am not looking for campaign promises, but I do hope to determine your judicial philosophy.

Judge Breyer, your objectivity, adherence to the Constitution, and your awareness of the limited power of judges and the appropriate role of the branches elected to decide policy questions are important. I look forward to addressing these issues with you during these hearings.

Senator GRASSLEY. Judge Breyer, I am glad to hear you say in your previous discussion with Senator Leahy that child pornography is not protected speech. You dealt with child pornography when you served on the Sentencing Commission, and you were making guidelines for violation of the child pornography statutes. There was a January 1987 meeting when one of the Commissioners, Judge MacKinnon, suggested adding an aggravating factor to the crime of transporting, receiving, or trafficking in child pornography. He proposed increasing the sentence when the large sums of money often correlated with organized crime involvement in child pornography were present. And he made a motion to raise

the base sentence by four levels, where the retail value of the exploitative material exceeded \$25,000. It passed by a 5-to-1 vote.

The one vote against the motion was yours. I am sure you had very good reasons. Could you give me the reasons why you were the sole dissenter in a decision to impose tough sentences on the very worst child pornography producers and peddlers?

Judge BREYER. You have to understand, Senator—well, let me think about it for a second. I am thinking of the best way to explain what I am guessing now I was doing then.

It is unlikely that you can find merit in child pornography. Writing those sentencing guidelines was tough. It was very tough. The reason it was tough, in part, was because the seven Commissioners had very different views about which was the best or the worst or the medium or the best behavior or what the sentences should be for very different kinds of crimes.

So in order to create an approach, what I tried to do was this: I tried to say, with others' agreement, here is what we will do, and this gets rid of our subjective approach. Let's not try to get the right order of what is worse with what. If we do that, we will be disagreeing all the time. Let's do this. Let's get, with the help of 10,000 presentence reports analyzed in depth and 25,000 others analyzed in less depth, let's get a picture of how the sentencing system really has worked up until this point in 1987. And then what we will try to do is we will try to create sentences that mirror typical past practice, and we will try our best not to stray from that typical past practice. Sometimes we will modify, but we will have to have a very good reason.

Now, that was a principle that allowed us to write the guidelines. And as a person, as a person who pushed that principle, who felt it was an important principle, I had to live up to it myself, irrespective of how I might feel about the particular crime. So if, in fact, that typical past practice showed that whatever the sentence there was, I would resist people putting add-ons or subtractions or whatever they were, no matter how I felt about the underlying crime, because I was trying to maintain a principle. And, of course, if I deviate from that principle myself, everybody else will start to deviate, and, gosh, it is sort of difficult to know where it is going to end up.

So I tended in those guideline meetings to resist what I would call ad hoc changes, even though that ad hoc change might have been something that, from a policy point of view, would have been very good. And that is what I think you see reflected there.

Senator GRASSLEY. You saw Judge MacKinnon's motion to be extraordinary, then.

Judge BREYER. I would say probably it reflected a view that this is a very, very bad crime. And I would have shared that view. It is a very, very bad crime.

Senator GRASSLEY. I want to now talk with you about precedent on the Supreme Court. You have different considerations, obviously, than you will as an appellate judge, where you have been for 14 years. I want to relate it to a public policy issue that we deal with here in Congress and will be dealing with more in the future. And if you will bear with me, let's talk about one line of Supreme Court cases as it relates to these policy issues.

During the 1960's and 1970's, the Supreme Court issued a series of opinions striking down statutes that treated differently children born to married parents as opposed to children born out of wedlock. The Court also rejected differing treatments based on whether the out-of-wedlock child had been acknowledged through a subsequent marriage of the parents. These decisions, as you will recall, rejected differentiations in welfare benefits between the two situations.

The Court did not find that the State's interest in preserving and strengthening family life or protecting families from dissolution or discouraging bringing children into the world out of wedlock was sufficiently legitimate to justify these distinctions that the States had set up. Instead, the Court found that only moral prejudice could justify differential treatment, particularly since children could not affect their status. Such statutes were called in the *Weber* case illogical and unjust.

Instead, the Court focused on the needs of children for these benefits, and it found no rational basis for believing that illegitimacy would increase if some of these statutes were struck down. So the Court did strike them down.

We now know, 20 to 30 years later, that the Court was a very poor forecaster of future social environment. As you probably know, the Court said that it was—and this is again from the *Weber* case—powerless to prevent the social opprobrium suffered by these hapless children. And, of course, as we look back now, at least from my perspective, the Court was just plain wrong on what they saw to be the results of these decisions.

Today there is hardly any stigma in any place. In many places, there is no stigma in having out-of-wedlock births. A major reason for this is that societal disapproval of the practice can no longer be expressed through law, thanks to these cases that are involved.

To some extent, the Court reflected as well as affected social opinion. But the fact is that the Court, through these decisions, has played a role in bringing about far-reaching negative changes toward society. For instance, in 1970, the percentage of out-of-wedlock births was 10 percent; now it is 30 percent. Young people from single-parent families are two to three times more likely to have emotional or behavioral problems than those from intact families. They also face higher risk of child abuse and neglect, poor performance in school, having children on their own as teenagers, what is called kids having kids, you know, having their own marriages end in divorce, and a six times greater risk of being poor.

The absence of parents frequently leads to both illegitimacy and welfare dependency for a series of generations. Males born out of wedlock are much more likely to engage in criminal activity than their counterparts born to married parents, particularly if they live in neighborhoods that have a high concentration of single-parent families.

So, finally, Judge Breyer, State legislatures and Congress are trying to respond to this, very much in a bipartisan fashion now. It kind of makes you wonder how you could get so much unanimity all at one time. These legislatures, and even we in Congress, have decided that action is quickly needed to reduce illegitimacy and its attendant negative social consequences.

In seeking to address the problem, these legislatures and the Congress do run the risk that if the Supreme Court follows its current jurisprudence, many possible reforms could still be unconstitutional. Now, one of the reasons the Supreme Court has given for overruling decisions in the past—and I am speaking generally about decisions, not just about this line of cases—is that facts have so changed or come to be seen so differently as to have robbed the old rule of significant application or justification.

If a case were before you raising whether certain of the Court's decisions involving illegitimacy should be overturned, would the societal changes that have developed over the last 30 years be relevant to your decision? Now, I am not asking you how you would rule in a certain specific case. I am just trying to get a feel from you whether you would consider these changed facts in reaching your decision.

Judge BREYER. They are relevant. I think they are relevant. I think that in applying the Constitution in general, one looks, of course, to the conditions of society. I think the Constitution is a set of incredibly important, incredible valuable principles, statements in simple language that have enabled the country to exist for 200 years, and I hope and we believe many hundreds of years more.

That Constitution could not have done that if, in fact, it was not able to have words that drew their meaning in part from the conditions of the society that they govern. And, of course, the conditions and changed conditions are relevant to deciding what is and what is not rational in terms of the Constitution, as in the terms of a statute or in any other rule of law.

Senator GRASSLEY. I think I am reading you that you would have an open mind.

Judge BREYER. Yes, I would.

Senator GRASSLEY. Yes; and I think that is pretty important because the President who nominated you, President Clinton, liberals in Congress, conservatives in Congress, are looking for solutions to the problem of the breakup of the family and strengthening the family. We see these trends of the last several years as very, very bad, and you may have some cases sometime that would cause you to look at these records and these facts that precede this now.

I appreciate very much that you would see having an open mind on that issue.

I would like to go now to the use of legislative history. You and I, I think, share a similar view on the use of legislative history in the interpretation of statutes, unlike, for instance, the way I view Justice Scalia not wanting to look at legislative history. You have written Law Review articles about it, and from a reading of your cases, I can also see that you are willing to rely on legislative history.

I want to discuss one of your cases as an example, *U.S. v. Maravilla*. I think it is a good example of your use of legislative history. I want to discuss it and then explore with you whether there are limits to the use of legislative history.

In *Maravilla*, you examined whether civil rights law applied to a temporary visitor to the United States. That was a case where two U.S. Customs officers had kidnapped a money launderer from the Dominican Republic. They stole his money and killed him. They

were charged with a variety of crimes, although there was not a Federal murder statute applicable. Included in the charges was a violation of the civil rights law that covered inhabitants of the United States.

You made a very thorough analysis of the statute, including reviewing the legislative history of the law, and concluded that the courier did not fall within the law's protection. Briefly, what role did legislative history play in your analysis, and would this be an example of how you might use legislative history on the Supreme Court?

Judge BREYER. Yes, yes is the answer. Briefly, it is a word. The word was inhabitant. It does not, obviously, in any obvious way, describe a person who comes to the United States for a few hours. Yet the civil rights laws are supposed to offer broad protection, and it is not absolutely out of the question. So how do you know what the people who passed that law really had in mind. The only way is to understand the context in which the statute arose and what the human being who wrote that word into the statute was thinking about. And if that was a staff person, which it would not have been at that time, but if it was now the staff person as acting with the knowledge of what the Senator believes is important and what those views are, and, therefore, what one is trying to get at is what does the Senator think about this.

Now, of course, sometimes that is all very controversial, and sometimes what has happened in some cases is what Judge Leventhal used to describe. He said, oh, it is like going to a cocktail party and looking over the crowd and picking out your friends. What he is describing is a misuse of legislative history.

Very often, by going into those debates, you can get a pretty good idea of what they had in mind, the Senators who passed that, and I think that is what—and I hope it is a good use of it. I hope you find it a good use of it. But that is the kind of thing I would tend to do. That is the kind of thing I do.

Senator GRASSLEY. This term the Supreme Court decided *Langraf v. USI Film*. It was an 8-to-1 decision. In that decision, the Court reviewed the 1991 Civil Rights Act and found that it was not retroactive.

Judge BREYER. Yes.

Senator GRASSLEY. The case involved a woman who claimed she was a victim of sexual harassment. She quit her job after her harasser was disciplined, and then she sued the company. The Court found the harassment did not justify her resignation, and she was not entitled to any relief under title VII.

While her appeal was pending, Congress enacted the 1991 Civil Rights Act, which allows for recovery of damages for pain and suffering. *Langraf* argued the law was retroactive and that she should recover damages for pain and suffering, and, of course, the Supreme Court, 8 to 1, disagreed. First, the Court found the statute did not contain a clear expression of retroactivity. Second, the Court reviewed legislative history, and that is the point I want to bring up here, finding it to be inconclusive and even conflicting on the issue of retroactivity.

The Court relied upon the canons of statutory construction, which included a presumption against retroactivity. So if I could

follow up with you on a discussion that you had with Senator Biden this morning, what happens when a judge has to look at conflicting statements by Members of Congress, all of whom say that they are supporting the law? It probably makes your job very difficult, right?

Judge BREYER. Yes; that is the art. That is the art, and you cannot always get it right, either. And where it is conflicting, sometimes it is absolutely inconclusive. But it helps. It helps to try through reading the documents, recognizing that this is a world in which you do not come here with a quill pen and your briefcase. A labor union does not operate just with one person, nor does a business. And there are many people involved in the legislative process that ultimately the policy decisions are yours.

And what the Court is trying to do in reading legislative history is, through reading this entire record, hearings if necessary, back to finding out where the words originated, looking at the floor debates, is to do its best—which will not always be right, but to do its best to identify the human purposes. And usually there are two or three several different ones that identify the basic purposes that are driving you. And often, but not always, that gives a key to the correct interpretation of the statute.

Senator GRASSLEY. What does it say about Congress' willingness to kind of punt to the judiciary what might be a tough legislative decision?

Judge BREYER. Sometimes Congress will.

Senator GRASSLEY. It probably says we are shirking our responsibility.

Judge BREYER. Well, normally, you know, I think it is pretty common, and if you punt to a regulatory agency, the executive branch filling in the interstices is pretty common. If you want, I mean, I think it is risky.

Senator GRASSLEY. So you would say that there is a limit to the Court's reliance upon legislative history.

Judge BREYER. Of course there is a limit. There are some problems it just does not solve. But I think it is helpful, I think it is helpful, and obviously, from what I—

Senator GRASSLEY. Congress cannot hide behind a statute by giving it to the courts to make a tough decision instead of our doing it during the drafting process.

Judge BREYER. That is true.

Senator GRASSLEY. In fact, in *Langraf*, the Court said it would not permit uncertainty in litigation if Congress has not specified whether a statute is to apply retroactively. Many of my colleagues on this committee, and I as well, have worked over the last number of years to get Congress to be clear in drafting by stating whether or not the law was intended to be retroactive, whether or not we were trying to apply a private right of action, whether or not we preempted State laws. Quite frankly, we have not been very successful in getting our colleagues to do that. But now the *Langraf* decision achieves some of what I think we have been trying to do.

The Supreme Court stated that it will hold Congress to a clear statement rule of statutory construction. If Congress clearly states in the text of the law that it is to apply retroactively, then and only then will the Court enforce it retroactively. If Congress is ambigu-

ous, then the Court will apply a default rule that the statute would apply only prospectively.

What do you think of the Supreme Court's adoption of the clear statement rules?

Judge BREYER. Well, I do not know about that particular case or not, or others that might come up. I think it is preferable, as I have written, that Congress just directly deal with the issue rather than the Supreme Court having various clear-statement rules, because those become all these different canons. And what I said as a kind of joke at one point, I said, well, you know, you can have canons to the left of them, canons to the right of them. I mean, it is very hard for people to draft and to understand what legislation is really going to turn out to be in practice if you have all these canons and there are dozens of ones and they used to conflict. That makes it—in a way, canons can make it more difficult for you, it seems to me, rather than less. It would depend what they were.

The CHAIRMAN. If the Senator would yield, retroactive canons are particularly difficult.

Senator GRASSLEY. Well, you know, as a former staff member of this committee, you surely had to deal with some of these problems as well.

Judge BREYER. Yes.

Senator GRASSLEY. And don't you think it is really better for the Court to say that if you want us to apply something retroactively, say so? Isn't that the position Congress should be in, encouraged to draft as particular a statute as they can?

Judge BREYER. That particular one—that is why I am hesitant to comment on a particular one. Maybe that would work. I am not sure. I have not thought it out.

What you have when you have like a clear-statement doctrine, then you have to go in and say what is a clear statement? And then you will find a case where nobody said anything, but it seems obvious that it ought to be retroactive.

You discover all kinds of problems with canons, all kinds of problems, and ultimately we have a system where—you see, as a staff person, I always felt that what I am supposed to do in these areas is identify for the Senator what the policy problems and issues are and then transmit that to other members of the staff and, through them, to other Senators. And that process works fairly well. Not perfectly, but it leads all the people who are affected by legislation and have representatives or try to get their voices through to you, they begin to know what to expect. That system does not work perfectly, but it is not terrible. And I have expressed a degree of concern about moving to some totally different system which I think would end up with your voice being less direct and having less effect and making it harder to understand the human purposes that move you.

Senator GRASSLEY. Some people might try to make the case that it might be the present Supreme Court trying to be a conservative activist Court, when, in fact, what the Supreme Court maybe is really trying to do is to say to Congress, do what you were elected to do, and that is make some tough choices. I think it shows in *Langraf* that clear statement rules are not a conservative judicial activism. Because here is a case where Justice Stevens wrote an

opinion setting forth a rule, denying retroactivity to a statute, overturning decisions that Stevens previously had dissented in.

Judge BREYER. Your basic point, I—

Senator GRASSLEY. Getting back to legislative history, there is another limit. Wouldn't you agree that it is inappropriate for a judge to use legislative history to reach a result not mandated by statute? I think you spoke about some inappropriateness.

Judge BREYER. Sure. Ultimately, you are there with the language of the statute, and the language of the statute is what governs. You know, history comes in where it is hard to figure out how it applies and what it really means, and so forth. But it is not the statute that is explaining the history. It is the history that is explaining the statute.

Senator GRASSLEY. By the way, in that 8-to-1 *Langraf* case, do you think that you would have been in the majority?

Judge BREYER. I have not read it with enough thoroughness to know.

Senator GRASSLEY. The reason I was asking is that Justice Blackmun was the one who dissented in that case.

You have written a lot about legislative veto. I have had a long-standing interest in that. You find the *Chadha* decision very sound. I am not sure that I agree with that, but that does not keep me from looking to see what can be done. I think you have offered some very good suggestions for Congress to maintain its check on agency power.

If I could draw your attention to the current controversy over some proposed agency regulations. I use these just as an example, because eventually these might even get to the Court, and they are something we have recently dealt with in this committee.

The EEOC has issued regulations on religious harassment. Many of us believe that the EEOC has overstepped its boundaries. The regulations could make any religious expression in the workplace almost prohibited. But we have no real check on the EEOC's power to issue regulations, other than our public relations perspective.

From your writings, it seems to me that you believe it is within Congress' power to be a firm check on agency power. Would the EEOC's actions be an illustration of agency power which we here in the Congress, if we wanted to, could appropriately check?

Judge BREYER. That would be for you to judge. That would be for you to judge. My question would be whether there is some way of—I mean you have a lot of ways of controlling the agencies, obviously through the appropriations process, through legislation, through hearings, through letters, through suggestions, through discussion. There are many, many, many ways in which Congress has power over the agencies.

The legislative veto was one way that became popular, that the agency passed a legislation, if one House vetoed it, that is the end of it. Then Congress said that was unconstitutional. So I tried in the article that you were speaking of, to think is there some other way you could get to the same result, and I think I thought of one that was not quite the same result, but close. But it is a little complicated.

Senator GRASSLEY. That is this confirmatory clause?

Judge BREYER. Yes, it was a bit gimmicky, that what you do is it would take effect only if you passed a law confirming it, but you would have a rule that it went right on a fast track, not debatable, and if one House—

Senator GRASSLEY. You wrote about that 11 years ago. Do you think you would still feel the same way today in that Georgetown Law Review article?

Judge BREYER. It is a suggestion and it would be a suggestion that I felt was a little gimmicky, and if people in Congress wanted to do it, it was explained and then it would be entirely be up to you.

Senator GRASSLEY. Well, if Congress could use a provision like that, it seems to me like it would effectively give Congress some control over the regulations of an agency like the EEOC. If you still feel the same way about that now as you did 10 years ago, that helps me to understand where you are coming from. Do you feel like you did?

Judge BREYER. I think it is a possibility.

Senator GRASSLEY. I assume, though, when you say it is a possibility, that if you wrote in the Georgetown Law Review about a possible process of what you call confirmatory law, you had given considerable thought that it was possibly as an appropriate constitutional congressional response to *Chadha*?

Judge BREYER. I would stick by what I said.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. I would like to point out for the record, Judge, that Senator Grassley, with each successive hearing, is losing his credibility in the following sense: He always makes the case that he is a nonlawyer. He brags about that at home. He knows a heck of a lot of law, for a nonlawyer, pretty impressive. Soon, no longer are you going to be able to make the claim, Senator, that you are a nonlawyer. You are beginning to sound like a lawyer.

I would also note, before I yield to Senator DeConcini, that I find it somewhat fascinating—and I would like you to keep this in mind for tomorrow—that the very Justices that have been before this committee and are now on the Court who have argued the doctrine of original intent when interpreting the Constitution are the very Justices who are the new textualists who argue, when it comes to a statute, that they do not have to go beyond the words of the statute to seek intent.

I have always found that fascinating, how, when looking at the Constitution, they have concluded that we must go look at the original intent of the drafters and stick to that, but when looking at the statute, they look only at the text of the statute and not the legislative history, which they pore through in order to find constitutional rights, whether they exist or not, but do not pore through when it comes to looking at the text, which leads me to the conclusion that all Justices, liberal and conservative, are result-oriented, whether they know it or not. But that is my prejudice.

I will yield to Senator DeConcini.

**OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S.  
SENATOR FROM THE STATE OF ARIZONA**

Senator DeCONCINI. Mr. Chairman, thank you.